

Montana's Public Trust Responsibility



**A GUIDE FOR FWP AND MONTANA'S
CONSERVATION COMMUNITY**





WHY THE PUBLIC TRUST?

FWP's responsibility to steward the public trust explains almost everything this department does. Working with landowners, tribes, communities, conservation groups, and other agencies, we help people connect with the natural world via hunting, fishing, camping, boating, and other outdoor recreation. We provide these opportunities so that people today can use and enjoy their fair portion of the public trust, while we balance that use against the need to conserve wildlife, fish, and state parks for future Montanans and visitors.



Understanding our public trust responsibility is critical to understanding why this agency exists and how we can best steward the natural resources we've been entrusted to manage and conserve.



Left to right from top left: Thom Bridge; John Warner; Rion Sanders; Tommy Martino; Tom Dickson; Laura Lundquist; Paul Queneau; Alexis Bonogofsky; John Warner; Tommy Martino; Thom Bridge; Tommy Martino; John Warner; Braden Gunem; Jeremie Hollman; Allen Morris Jones

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- ▶ No individual can own public trust resources (for example, wildlife, fish, and state parks); they cannot be privatized.
- ▶ All public trust resources are held in trust by the state for the public (the trust's "beneficiaries").
- ▶ Elected and appointed state officials are the "trustees."
- ▶ State wildlife agencies like Montana Fish, Wildlife & Parks are the trust "managers."
- ▶ Public trust resources are trust "assets" and are managed for both current and future generations.

Lon Lauber



Floating down a scenic river. Hiking along a forested trail. Hunting mule deer or pronghorn on the prairie. Fishing for trout or walleye on a sunny afternoon with your friends or family.

Everyone who lives in and visits Montana is fortunate to have such treasured places and experiences. But as Montana conservation giant Jim “Poz” Posewitz used to say: “It didn’t happen by accident.” Yes, Montana has been blessed with mountains, grasslands, rivers, and wildlife. But it’s only thanks to the foresight and dedication of conservation leaders like Poz, along with landowners, other individuals, nongovernmental organizations, and federal, state, and tribal leaders and agencies, that so many of those resources still exist for us to enjoy.

Over the past century, these individuals, groups, and agencies have produced and supported a framework of laws and regulations safeguarding Montana’s clean and scenic outdoors. Examples include the Migratory Bird Treaty, Endangered Species, and Clean Water Acts; Montana’s visionary Stream Access Law and Stream Protection Act; landmark documents like the Montana Constitution; and guiding principles such as the North American Model of Wildlife Conservation.

At the heart of these efforts to successfully steward Montana’s natural resources is a concept known as the “public trust.”

WHAT IS THE PUBLIC TRUST?

The public trust concept, also called the public trust doctrine, derives from the long-held societal belief that *certain natural resources are so important to everyone that they should be off limits to individual ownership, or privatization*. The concept also maintains that it's the government's responsibility to steward these public resources for the fair and equitable enjoyment and use by current and future generations.

The word “trust” here refers to an arrangement in which one person or group is legally designated to manage funds or property (or in



Montana FWP

this case, natural resources) on behalf of others (in this case, the public).

Trusts are legal tools often used to help families or individuals manage their assets. Let's say your aunt gave you \$10,000 with the understanding that you'd hold, protect, and safely invest the money and use it to provide for her. For this to work legally, she would set up what's known as a financial trust, with you as the "trustee" and herself as the "beneficiary." Your responsibility would be to manage the trust's assets—the \$10,000—to ensure that her present and future needs are met. As the trustee, you would have to manage the assets prudently and responsibly. For instance, you couldn't use the money to bankroll a friend's dodgy business venture or spend it on yourself.



Braden Gunem

It works the same way for Montana's rivers, water, fish, wildlife, cultural resources, and state parks. Those public trust "assets," or resources, are held "in trust" by the state, acting as the trustee, and are stewarded by FWP, the trust manager, for the people of Montana, the trust beneficiaries.

The state is involved because the public needs a way to collectively decide the fairest and most sustainable way to manage and allocate trust resources for current and future generations. Legislators, the governor, the Fish and Wildlife Commission and Parks and Recreation Board members, and department directors are elected or appointed to make decisions on behalf of the trust beneficiaries. If the trustees don't uphold their obligations to protect the long-term health of the trust, the beneficiaries can hold them accountable in the courts or at the ballot box.

State wildlife agencies were created to ensure that public trust assets are stewarded by professionally trained biologists, game wardens, park managers, technology specialists, and others.

THE PUBLIC TRUST'S ORIGINS

Protection and conservation of wildlife and fisheries for the common good is a defining characteristic of the United States. Canada and several other countries also steward wildlife for the benefit of all. But the United States is the undisputed leader when it comes to legal protections of these resources.

With roots in the Roman Empire and later assimilation into British common law, the public trust concept, or doctrine, arrived in this



Public Domain, U.S. National Archives

country with European immigrants who sought freedom to practice their religions and to escape from Old World class systems that gave control of land, wildlife, wealth, and political power to a privileged few. The nation's founders sought to establish a new social and political model where everyone had the right to equitably share certain natural resources.

At the same time, America's founders also recognized everyone's right to own private property. To secure that right, the Fifth Amendment's "takings" clause requires the government to compensate landowners when taking property for public use.

As part of their balancing act between the rights of an individual and the common good, the founders did not include wildlife as part

of private property, as in Europe. Though federal law eventually allowed private ownership of coal, minerals, timber, oil, and gas, no administration or court has ever authorized the privatization of commonly shared public trust resources like water and wildlife that move across property boundaries.

OYSTERS, THEN ALL WILDLIFE

At first, the public trust concept applied only to U.S. waterways and shorelines. The Supreme Court of the United States strengthened the notion with three 19th-century decisions. In *Martin v. Waddell* (1842) and *Illinois Central Railroad v. Illinois* (1892), the court's rulings reaffirmed that government is responsible for ensuring that shorelines and navigable waters are protected for the equitable use of current and future generations. *Martin* also included shoreland wildlife (in this case, oysters) as a public trust resource. In *Geer v. Connecticut* (1896), the high court recognized wildlife as a public resource held and managed by the states for the benefit of all.

The *Geer* decision coincided with growing public recognition that large wildlife species—deer, elk, bison, bighorn sheep, and pronghorn—were being hunted to near extinction. Federal officials responded to this conservation awakening by embracing the more expansive notion of the public trust that included wildlife articulated in *Geer*.

This expanded public trust concept was strengthened in the late 19th and 20th centuries with a series of federal laws aimed at protecting trust resources and ensuring their equitable use. These include the Unlawful Enclosures Act (1885), Lacey Act (1900), Migratory Bird

Treaty Act (1918), Clean Water Act (1972), and Endangered Species Act (1973). State laws followed, as did formation of state-level conservation agencies such as Montana Fish, Wildlife & Parks to carry out these laws on behalf of the public trust and to steward public trust assets.

THE PUBLIC TRUST AND PRIVATE PROPERTY

One of the great real-life challenges of the public trust is reconciling that concept with private property rights. The public trust and private property are two of the most strongly held values in the United States. Not surprisingly, there is inherent tension between the two.

Society has tried to balance these sacred principles through federal and state courts and legislation. For instance, even though elk are held in the public trust, a person can't hunt them on someone else's property without the landowner's permission. At the same time, even if elk are eating their alfalfa or corn, landowners can't kill elk except during hunting seasons and with requisite licenses and permits.

The state of Montana has also used land-management strategies to reconcile these principles. FWP first established wildlife management areas in the 1940s as elk wintering habitat to prevent the animals from overwhelming private ranches. It established the Block Management Program in the 1980s to help private landowners manage public hunting on their property. Conservation easements emerged beginning in the 1970s as a way for the hunting public, via FWP, to pay landowners to protect wildlife habitat.

Montana and FWP have also long recognized that wildlife populations restored under the public trust can be a burden for Montana's



ranchers, farmers, and rural communities. Elk and deer consume crops, while wolves and grizzly bears stress and even kill livestock. Irresponsible hunters pursuing Montana's restored game populations inconvenience landowners by littering, trespassing, driving off road, shooting up signs, and knocking on front doors before sunup.

Meanwhile, citizen-based groups across Montana have found ways to reconcile the private-public tension. The Ranchers Stewardship Alliance, a stockgrower-led organization in north-central Montana, works to sustain rural economies and communities while conserving public wildlife, land, and waters. Private-property owners

and public wildlife advocates sit down to hash out disagreements through groups like the Musselshell Watershed Coalition, Blackfoot Challenge, Devil's Kitchen Working Group, Ruby Valley Strategic Alliance, Winnett Agricultural Community Enhancement and Sustainability (ACES) working group, and Big Hole Watershed Committee.

One reason these coalitions succeed is because so many landowners understand that wildlife diversity, including predators, is essential to the Montana landscape and helps make this state unique. They take pride in helping steward wildlife. They recognize that hunting is part of Montana's rich heritage and accept the responsibility of allowing some access to the wildlife on their property.

Again and again, Montanans have found common ground this way, recognizing that private property rights and the public trust are social agreements negotiated to maximize values like free will, liberty, and the common good; that "winner take all" is not a sustainable strategy, but instead results in decisions being made, then unmade, each time political power changes hands; that the most durable decisions are based on trust, honesty, and strong relationships.

The ability and commitment to listen to and consider alternative perspectives on land, water, and wildlife issues leads to lasting solutions fair to everyone—and which no single individual or group, public or private, could imagine (or sustain) on its own.

In that sense, the tension between property rights and the public trust concept serves Montana well. Seeing the world through others' eyes leads to learning, adaptation, resolution, and a stronger and more stable community.



THREATS TO THE PUBLIC TRUST

As this public-private reconciliation continues in the 21st century, Montana's natural resources face unprecedented threats. Climate change is stressing trout populations and reducing water supplies. Maladies like West Nile virus and chronic wasting disease are spreading within wildlife populations. Wildlife and fisheries habitat is being overrun by spotted knapweed, Eurasian watermilfoil, and other invasive plants.

The biggest threat of all may be indifference. Too few people understand that maintaining clean water, accessible lands, and healthy wildlife requires public dedication and involvement. Yes, people show up at rallies demanding that public lands remain in public hands.



Some attend meetings and legislative hearings, or sign petitions requesting fish and wildlife habitat protections. But to fulfill their role as trust beneficiaries, more people need to do this and other essential conservation advocacy work.

At the same time, people are using and enjoying Montana's trails, rivers, reservoirs, and parks in ever-increasing numbers. But too many take these public trust assets for granted, and seem uninterested in understanding what it takes to build and maintain those well-used resources.

It hasn't always been so. In the 1930s, '40s, and '50s, hunters and anglers across the United States brought game species back from the brink of extinction and protected dwindling fish stocks by agreeing to tax their own hunting and fishing equipment purchases to pay for management and conservation. They and other conservationists also successfully pushed for federal legislation protecting air, water, wilderness,



Far left: Nate Howard; Shutterstock

and endangered species.

These all were well-fought successes. But because smog no longer blocks the sun, rivers no longer sicken swimmers, and wildlife species like deer and elk in some places have become overabundant, people have grown complacent.

That could be changing.

Montana's outdoor recreation boom means that more people are connecting to the natural world. And the more people who sit around a campfire, hike through forests, take up bowhunting, learn to fish, and even stroll urban nature trails, the more likely they will be inspired to care for and work to protect land, water, and wildlife.

UP SOME, DOWN MORE

To get that work done, to advance the necessary, ongoing public-private conversations that evoke shared solutions, it's important to know when to stand up for the public trust—and, even more importantly, when to sit down.

In the past, standing up meant fighting for Montana's Stream Access Law and against efforts to build a dam on the Yellowstone River that would have flooded Paradise Valley. Today it means fighting for public access to public lands and against privatization, pollu-



Jeremie Hollman

tion, and commercialization of our public trust resources.

These are all worthy battles. But long-term success requires knowing how to pick your battles. Issue advocacy framed as combat usually produces winners and losers. And losers usually don't just give up. They regroup, bide their time, and return to fight for what they lost. That can create new losers. Back and forth it goes, decade after decade, with no lasting progress for land, water, or wildlife.

Some people and groups favor this stand-up-and-fight strategy in all cases. Unfortunately, that inflexibility can damage vital relationships. It creates an "us versus them" dynamic that closes the door to

compromise and the steady progress that comes from building trust and mutual respect with others.

Often a more successful—and sustainable—strategy is to sit down.

That means having the courage and patience to meet with people who have a different perspective on wildlife, fisheries, land, water, or access issues. It means respectfully and intentionally listening and hearing—the ultimate sign of respect. It means checking egos at the door and investing the time to build trust.

When people who have different values and perspectives meet, everyone doesn't have to agree with each other. But we do need to acknowledge each others' fears and concerns. We need to show humility and recognize everyone's inherent dignity. Then we can collectively use the shared understanding and trust that emerges from this process as a foundation on which to build a solution.

How do Montana conservationists know when to hold firm and when to work cooperatively—when to stand up and when to sit down? In general, conservationists should stand firm whenever Montana faces a net loss in the integrity of, access to, or capacity to manage public trust resources:

- ▶ **“integrity”** means an immediate threat to the health or sustainability of our land, water, and wildlife.
- ▶ **“access”** means actions that reduce the public's ability to use these resources.
- ▶ **“capacity to manage”** means anything that weakens FWP or other agencies entrusted with the stewardship of public trust resources.

- ▶ **“net loss”** means that sometimes it’s worth giving something up to get more back. That might entail exchanging a piece of public land for private property with a higher wildlife and public access value. Or giving landowners a bull tag in exchange for allowing increased public hunting opportunities on their property.

LIKE A PONDEROSA PINE

People who care about safeguarding the public trust also must be more flexible. Our world is increasingly complex, volatile, and uncertain. What we did yesterday may not work today. We need to adapt.

Wildlife managers are familiar with the concept. They adapt management of waterfowl, mule deer, elk, and other species to changes in climate, hunter harvest, habitat, and populations. To apply this approach to managing contentious issues and changing demographics means gathering more and better information—about people as well as fish and wildlife—and then adjusting management strategies accordingly. It means taking a close look at all of the ways people use Montana’s natural resources, inviting all those users into the conservation tent, and finding additional ways to fund public trust stewardship and management.

Staying flexible while remaining true to our values and principles requires FWP and Montana’s conservation community to be like a ponderosa pine, strong yet flexible enough to absorb even the fiercest winds. If we don’t, we will be uprooted and blown over.

Previous generations gave us a great gift of the rivers, prairies, forests, wildlife, parks, and fish we enjoy today. It’s our responsibility



to take what they bequeathed and continue Montana's long and proud heritage of stewardship excellence. But we live in a new era, one that demands new thinking and approaches, both rooted and flexible. It requires us to oppose actions that degrade the public trust while working with everyone to produce lasting solutions for all.

This is how conservation and stewardship will succeed. This is how we honor and protect the public trust. ■





John Warner



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Left to right from top left: Montana State Parks; Thom Bridge; Eliza Wiley; John Warner; Erik Petersen;
John Warner; Erik Petersen; Jesse Lee Varnado. Grizzly bear cover photo: Cindy Klein

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